BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EVA M. JONES Claimant	)	
VS.	)	
VIA CHRISTI REGIONAL MEDICAL CTR. Respondent	)	Docket No. 1,008,376
AND	)	
ROYAL & SUN ALLIANCE INS. CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the January 5, 2007 Order by Administrative Law Judge Nelsonna Potts Barnes. This is a post-award proceeding for medical benefits. The case has been placed on the summary docket for disposition without oral argument.

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for the claimant. Joseph MacMillan of Lenexa, Kansas, appeared for respondent.

ISSUES

The claimant suffered a work-related injury to her neck on October 9, 2000. Her medical treatment included a cervical diskectomy and fusion at C5-6 in 2002. The parties resolved this claim by an Agreed Award on August 22, 2003, but the claimant reserved the right to seek future medical treatment. After a post-award hearing, the Administrative Law Judge (ALJ), on October 18, 2005, designated an authorized treating physician to provide claimant additional treatment. On May 31, 2006, the claimant filed an application for post-award medical requesting the surgery recommended by Dr. Eustaquio Abay.

The ALJ granted the claimant's request for medical treatment and temporary total disability benefits. The ALJ further ordered that Dr. Eustaquio Abay be authorized as claimant's treating physician.

The respondent requests review of whether the ALJ erred in awarding post-award medical benefits to the claimant. The respondent argues the claimant sustained a new injury (Docket No. 1,029,154) and medical as well as compensation benefits, if any, are due to the intervening injuries claimant has suffered.

Claimant argues her current need for medical treatment is due to her original injury and therefore the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

At the post-award hearing on June 15, 2006, the parties agreed that the issue before the ALJ was whether the claimant's current condition relates to her initial accident, for which Royal & Sun Alliance provided coverage, or whether it is the result of her ongoing work activities.

Claimant sustained personal injury to her neck on October 9, 2000, while working as a registered nurse for respondent. She was treated by several medical providers and had a repeat anterior cervical diskectomy and fusion at C5-6 in 2002. Her workers compensation claim was settled by an Agreed Award entered August 22, 2003, for an 18.5 percent permanent partial impairment of function to the body as a whole. Future medical was ordered paid by agreement of the parties or upon application to the Director.

Between June 15, 2004, and June 3, 2005, claimant filed several applications for post-award medical only seeking payment of medical bills On September 15, 2005, claimant filed an application for post-award medical seeking payment of a medical bill and for medical treatment and treatment recommended by Dr. Melanie Greenwood. On October 18, 2005, the ALJ entered a Post Award Medical Order naming Dr. Sandra Barrett as claimant's authorized treating physician for all treatment, tests, and referrals, and also requiring that any change to Dr. Barrett's authorization be approved by the ALJ. The Post Award Medical Order also authorized Dr. Greenwood to prescribe medications for claimant's work-related injuries.

On May 31, 2006, claimant filed another application for post-award medical, this time requesting approval of surgery with Dr. Abay. A post-award hearing on this application was held June 15, 2006. At the Post Award Hearing, respondent's attorney argued that pursuant to the October 18, 2005 Order, only Dr. Barrett was authorized to provide treatment and referrals in this claim. Dr. Greenwood was only authorized to provide claimant with medication. However, respondent's attorney argued that Dr. Greenwood referred claimant to Dr. Abay for evaluation. Respondent's attorney stated further that claimant continued to work after the Agreed Award was entered until April 26,

2006, and had filed a new claim for a series of injuries from December 25, 2005, through April 26, 2006. (Docket No. 1,029,154)

Claimant's attorney argued that the claim in Docket No. 1,029,154 was filed out of an abundance of caution because he anticipated respondent would argue that claimant's need for surgery was not due to her original injury but because claimant had reinjured herself. Claimant, however, contends that she is suffering from the same injury she had previously.

Claimant testified that she continued to work as a registered nurse and for the last three years had worked in the labor and delivery unit at respondent. She worked until April 26, 2006, when she was taken off work by Dr. Abay. She testified she had been able to return to work for respondent after her surgery in 2002 but never felt that she recovered from her injury of October 9, 2000. She now has almost daily migraine headaches and pain in the upper part of her right arm, which she described as feeling as if a blood pressure cuff was on her right arm. The pain has progressed down to the lower part of her arm and she now has numbness and tingling in all her fingers instead of just the third through the fifth digits.

Claimant testified that her migraines started increasing in frequency in December 2005. She said she did not have a new accident or injury at work at that time and that she did no unusual lifting or activity. As a labor and delivery nurse, she is required to pull 50 pounds and be able to stand for an indeterminate length of time, move about the room, turn her head, and bend over. Claimant admitted that in her job in the labor and delivery unit, she was required to pull up to 50 pounds. Claimant had been examined in February 2003, before the Agreed Award was entered, by Drs. Paul Stein and Pedro Murati. Dr. Stein recommended that she avoid repetitive bending and twisting of the neck. Dr. Murati assigned a restriction of no lifting, carrying, pushing or pulling more than 20 pounds. Claimant agreed that at times she worked outside the restrictions provided by Drs. Stein and Murati.

The record in this case contains medical records of claimant from Drs. Greenwood and Barrett. Dr. Greenwood's records go back to May 2, 2005, when claimant came in for a follow-up on pain control for her workers compensation injury of October 2000. At that time she complained of an increase in her migraines and tightness in her right arm, secondary to her neck injury. Dr. Barrett saw claimant on November 4, 2005. At that time, claimant was complaining of persistent migraine headaches, right shoulder pain, and a constant sensation of a blood pressure cuff being inflated over her right upper extremity.

Dr. Greenwood referred claimant to Dr. Abay for a neurosurgical consultation, and Dr. Abay saw claimant on April 6, 2006. At that time, Dr. Abay found that claimant had definite C6 radiculitis. He noted that "[f]rom a surgical standpoint, she may benefit from a foraminotomy to the right at C5-6, possible C4-5." Dr. Abay ordered a CT myelogram and an EMG/NCT to rule out an ulnar nerve root irritation versus a C7-T1 radiculopathy.

On May 4, 2006, Dr. Abay saw claimant, at which time he stated she might benefit from a right C4-5, C5-6 foramintomy. After discussing the procedure with claimant, claimant indicated she would like to proceed with the surgery.

Claimant was evaluated by Dr. Paul Stein on June 29, 2006, at the request of respondent. Dr. Stein had previously treated claimant from July 11, 2002, through February 13, 2003, in regard to her work-related injury of October 2000. After reviewing claimant's medical records and performing a physical examination, Dr. Stein opined that her "current symptomatology is a continuation of her symptoms subsequent to the work injury of October 2000 and, likely, some additional soft tissue aggravation from her continued work activity."[1] Dr. Stein believed that claimant has had an increase in symptoms because of her work activity as a labor and delivery nurse, but he found no evidence that there had been any structural alteration or acceleration of the original pathologic process since her surgery in 2002. He suspected that claimant's increased neck discomfort and headaches were related to her soft tissue aggravation caused by her continued work activity. Dr. Stein did not find any evidence in his examination or review of test results that indicated further surgery would be beneficial to claimant. And he reiterated his opinion that claimant had reached maximum medical improvement in February 2003 for her accidental injury of October 2000. He did not think that there was any definitive, curative treatment for claimant's current complaints, since they are soft tissue in nature.

K.S.A. 44-510k provides that further medical care for a work-related injury can be ordered based upon a finding such care is necessary to cure or relieve the effects of the injury which was the subject of the underlying award. The controlling issue is whether claimant's present need for medical treatment for his low back complaints is directly and naturally related to the October 9, 2000 accident.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*[2], the Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1.)

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*, the Court attempted to clarify the rule:

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[1] Letter report from Dr. Paul Stein (filed July 11,2006) at 3.

[2] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.[3]

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activities aggravated, accelerated or intensified the underlying disease or affliction.[4]

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*[5], the Court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*[6], the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*[7], the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain

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[3] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[4] *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied 265* Kan. 884 (1998).

[5] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[6] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[7] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

In *Logsdon*[8] the Kansas Court of Appeals reviewed the foregoing cases and noted a distinguishing fact is whether the prior underlying injury had fully healed. If not, subsequent aggravation of the injury even when caused by an unrelated accident or trauma may still be a natural consequence of the original injury.

The claimant testified that she had been receiving medications for her persistent arm pain and headaches since her last neck surgery in 2002. She noted after that surgery her migraines would occur two or three times a month but the frequency and intensity progressed until she could no longer function. She further noted the feeling of arm tightness and pressure never went away following her surgery and that condition also progressively worsened until it has become almost constant. And after she was taken off work her condition did not improve. The medical records of Drs. Greenwood and Barrett contain histories of chronic headaches post cervical surgery. And although Dr. Stein stated claimant had reached maximum medical improvement in February 2003, he also stated that her current symptomatology is a continuation of symptoms subsequent to the October 2000 injury.

There is often a fine line between mere exacerbation of symptoms and an aggravation such that there would be a new accidental injury for purposes of workers compensation. The Board finds that claimant's continued employment, though perhaps a factor in claimant's increased symptoms, was not an intervening injury. Claimant's condition simply had never fully resolved and, therefore, is compensable as a direct and natural consequence of her original injury. Accordingly, respondent should remain liable for claimant's ongoing medical treatment as a result of the work-related injury in Docket No. 1,008,376. The ALJ's Order should, therefore, be affirmed.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated January 5, 2007, is affirmed.

IT IS SO ORDERED.

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[8] *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006).

Dated this 30th day of March, 2007.

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BOARD MEMBER

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DISSENT

Claimant's original injury occurred on October 9, 2000, and according to Dr. Stein she reached maximum medical improvement on February 13, 2003. Claimant returned to work with respondent and, as a result, her symptoms worsened. In addition, new symptoms appeared. Dr. Stein opined that claimant's aggravation and worsening was the result of her subsequent work activities. It is significant that after claimant returned to work for respondent she performed work that was outside her restrictions. I would find claimant's injuries attributable to her work activities after she reached maximum medical improvement from her original injury should be compensated as a new series of accidents and not as a direct and natural consequence of her original accident.

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BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Joseph MacMillan, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge